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Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-134

MRS. BILLIE MCCLURE,

Petitioner,

—v.—

THE SALVATION ARMY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on March 17, 1972.

Citations to Opinions Below

The opinion by the United States District Court for the Northern District of Georgia dismissing the complaint on jurisdictional grounds is reported at 323 F. Supp. 1110 (N.D. Ga. 1971), and is printed in the Appendix hereto at A. 1a. The opinion of the United States Court of Appeals, affirming the order of the District Court, but on

other grounds, is not yet reported, and is printed at A. 9a. The opinion of the District Court denying the petitioner, who had been previously authorized to proceed *in forma pauperis,* the right to a free transcript, is reported at 51 F.R.D. 215 (N.D. Ga. 1971), and is printed at A. 26a.

Jurisdiction

The judgment of the United States Court of Appeals was entered on March 17, 1972 (A. 32a). A timely petition for rehearing was acted upon by the Court of Appeals on April 26, 1972 (A. 34a), and this petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. A. Did Congress have the constitutional power, in enacting the equal employment opportunity provisions of the Civil Rights Act of 1964, to provide that all of the prohibited categories of employment discrimination, with the sole exception of religious discrimination, shall be applicable to employees of religious organizations, including employees who perform ministerial functions?

B. Is the First Amendment violated by §702 of Title VII of the Civil Rights Act of 1964 which exempts religious organization employers from the statutory prohibition of religious discrimination, otherwise applicable to all other employers, but does not exempt such employers from discrimination on grounds of race, color, sex or national origin?

2. Did the Court of Appeals, which found that the language and the legislative history of §702 of Title VII of the Civil Rights Act of 1964

> "compel the conclusion that Congress did not intend that a religious organization be exempted from liability for discriminating against its employees on the basis of race, color, sex or national origin",

and then, concerned with the constitutionality of such statute, construed it as not intending to regulate the employment relationship between a church and those of its employees who are ministers, erroneously apply the doctrine of avoidance of constitutional questions, and misconstrue the teaching of *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 346-49 (1936)?

3. Are religious organization employers constitutionally exempt from those provisions of Title VII of the Civil Rights Act of 1964 which prohibit punitive or retaliatory action against employees who file complaints of unlawful discriminatory activity?

4. Was petitioner entitled to proceed *in forma pauperis* in the District Court and in the Court of Appeals, to have a free transcript provided to her, and to have costs taxed in her favor in the District Court and in the Court of Appeals?

Statutes Involved

This case involves Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e, et seq.).

§702 (§2000e-1.) *Subchapter not applicable to employment of aliens outside State and individuals for performance of religious and educational activities of religious corporations, associations, or societies and educational institutions.*

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.

§703 (§2000e-2.) *Unlawful employment practices—Employer practices.*

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive

any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§704 (§2000e-3.) *Other unlawful employment practices—Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.*

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

§706 (§2000e-5.) *Enforcement provisions—Charges by persons aggrieved or member of Commission; copy of charges to respondents; investigation of charges; conference, conciliation, and persuasion for elimination of unlawful practices; prohibited disclosures; use of evidence in subsequent proceedings; penalties.*

• • •

Civil actions for prevention of unlawful practices; legal representation; commencement of action without payment of fees, costs, or security; intervention by Attorney General; stay of Federal proceedings.

(e) . . . Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. . . .

• • •

Attorney's fee; liability of Commission and United States for costs.

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Statement of the Case

Petitioner filed a complaint with the Atlanta, Georgia office of the Equal Employment Opportunity Commission (EEOC) on May 20, 1970, that as a lieutenant in the Salvation Army she, and other women officers, received less salary and fewer benefits than similarly situated male officers in violation of §703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e-2(a) (District Court complaint, Record in Court of Appeals, p. 270; references to Record hereinafter "R. ....."). On July 15, 1970, after the EEOC had failed to bring about Army compliance (R. 495), she instituted suit in the United States District Court for the Northern District of Georgia on the same charge against the Salvation Army Corporation of the Southern Territory (A. 1a).

The Salvation Army is a national corporation encompassing four regional corporations organized "for the purpose

of promoting the cause of Christian religion, charity and education" (A. 2a). It publishes and sells at a profit, *The War Cry*, a weekly national newspaper (A. 15a), and as of October 1969 counted 79,481 adults and 45,775 children in the United States among its membership (Deposition of Col. Longino, p. 9, included in Record of Court of Appeals).

Each territorial corporation has many of the attributes of a large and diversified corporation. As an employer, the Southern Territory Army alone pays over $7,000,000 annually to approximately 3,000 persons, not including its 1,330 officers. It administers and expends more than $147,000,000 over a six year period, and manages property valued as of 1969 in excess of $62,000,000. It receives $30,000,000 a year income (A. 15a), managing a total of 1,361 centers of operation, including stores, maternity homes and hospitals, men's and women's welfare residences, day care centers, boys' clubs, youth clubs, camps, lodges, residences, and social service centers (Affidavit of Mrs. McClure, R. 430).[1]

One of the major tenets of the Salvation Army organization, constituting Chapter XII, "The Position of Women," of The Salvation Army Orders and Regulations for Officers, is the principle that Army women are the equals of men. Paragraph 1 of Chapter XII sets forth the "Army Principle" as follows:

> "One of the principles of the Army is that women have the right to an equal share with men in the work of publishing salvation to the world. A woman may hold any

[1] The financial and business affairs of the Southern Territory Army have been described in a 1966 Men's Social Service Program flyer: "We are now in big business, both for the extension of God's Kingdom as well as in our program of operation" (R. 435).

position of authority or power in the Army, from that of a local officer to that of General" (R. 422).[2]

In "principle", therefore, Salvation Army women should be treated equally with men. In fact, in petitioner's experience, they were not, and she undertook in the proceedings in the district court to substantiate her allegations.

Women officers who marry male officers of lower rank must revert in rank to that of their husbands. Each wife's assignment within the Army, furthermore, is determined by her husband's qualifications, rather than by her own. Neither policy is based on a religious tenet (Longino deposition, pp. 157-58).

A household assistance allowance is provided for those male officers whose wives are taken out of the home by Army duties so that they are unable to perform "the usual duties of a housewife"; single female officers who are similarly taken out of the home, however, do not receive such an allowance, even when, as in petitioner's situation, they have

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[2] Paragraph 2 of Chapter XII continues:

"The principle of equality is founded upon the claims and sanctions of the Bible and upon the remarkable ability which woman possesses for managing the affairs of the salvation war, and for influencing for God the hearts and consciences of the people.

"(a) The part woman has played in the Army's history and the influence which the exercise of her gifts and her self-sacrificing labours have won for the Army have secured for her in the future that place in its councils and campaigns which she has enjoyed in the past.

"(b) Only a spirit of envy and jealousy, hateful to God and man, would allow woman to toil in the background, and deprive her of the honours and the recognition to which she is entitled."

children at home (Longino deposition, p. 85; deposition of Col. Cone, p. 38, included in Record of Court of Appeals).

A married female Army officer whose husband dies, automatically reverts from a married officer's salary to that of a single officer. If the husband had been a member of the Army, she receives a widow's allowance which varies with the number of years of her husband's service. If, as in petitioner's situation, the husband had not been a member of the Army, she is not entitled to receive a widow's allowance (Longino deposition, pp. 103-05). On the other hand, a married male Army officer whose wife dies does *not* automatically revert to a single officer's salary. His case is, instead, referred for individual treatment "to the territorial headquarters for decision as to salary and allowances, citing all circumstances, for continued maintenance of a widower's home" (Longino deposition, p. 103). Again, this policy difference, like those cited above, is not based on a religious tenet (Longino deposition, p. 158).[3]

During her three-year tenure as a commissioned lieutenant in the Salvation Army, petitioner spent only seven months fulfilling a ministerial role; she was the commanding officer of an Army corps in Pascagoula, Mississippi. At the same time, however, she was its administrator, public relations manager, janitor, newspaper distributor, and

[3] That the Army recognizes that this principle of equality for women is not wholly respected in practice may be inferred from the provisions of Recommendation #6 of the Territorial Officers' Advisory Commission (September 25, 1969) urging "a study of feasibility of development in the following areas:" that a single woman be considered for advancement in each case on the basis of her qualifications; that women share in the decision-making with regard to Army policies; that widows' and widowers' allowances and salaries be exactly equal; that fringe benefits be equal for all officers, etc. (Cone deposition, p. 34, McClure Ex. #4).

fund raiser, activities which she considered to be half secular, half religious in nature (Deposition of Mrs. McClure, p. 86, included in Record of Court of Appeals).

For the duration of her Army career, petitioner performed essentially non-ministerial duties, all of which were capable of performance by any qualified lay person. She served as a Casework Supervisor in the Metropolitan Atlanta Welfare Department of the Salvation Army. As such, she was responsible for conferring with caseworkers concerning family in-take, assuring that proper referrals to other agencies were made, and maintaining adequate communication with other welfare offices. Both petitioner's predecessor and her successor as Casework Supervisor were lay persons (R. 423).

She also served as an office secretary to a Salvation Army Major, performing duties normally associated with such a position, until she was assigned in October 1969 as assistant secretary to the secretary of an Army Brigadier. The Brigadier's secretary, petitioner's immediate supervisor, was a lay woman. Both petitioner's predecessor and her successor on the job were lay persons (R. 423-24).

Throughout her Army career, petitioner struggled to maintain her three children and herself on a single officer's salary of only $35.50 a week (R. 424) plus minimal children's allowances. At the same time, she observed that widowers[4] in similar situations receive substantial household allowance, in addition to their salary, to ease the burden of family support (McClure deposition, pp. 110-14). Troubled by this inequity, petitioner frequently complained of it to

[4] A divorced woman is considered by the Army to be a widow; a divorced man, a widower (McClure deposition, pp. 97-98).

her supervisors. The response by petitioner's supervisors was to schedule a hearing to review her fitness as an Army officer (Longino deposition, pp. 219-20).

Petitioner's efforts within the Army at rectifying discrepancies between male and female compensation having been frustrated, she finally sought help elsewhere, filing a complaint with the EEOC. The June 4th publication in the *Atlanta Constitution* of an article concerning her complaint to the EEOC resulted in her immediate suspension (Longino deposition, pp. 127-28). Petitioner was subsequently found unfit to serve as an officer (R. 324), and was discharged, effective July 19, 1970, from the Salvation Army (R. 580). On June 11, 1970, prior to instituting suit in federal court, petitioner filed a second charge with the EEOC that she had been discharged only because of her discrimination-imposed financial hardships, her opposition to that discrimination, and her filing of a complaint with the Commission (R. 210).

The district court, after a lengthy discussion of the Salvation Army's good works, found that the Army is a religion (A. 5a), that petitioner was a volunteer rather than an employee of the Army (A. 7a), and that all of petitioner's activities as an officer—ministerial and secular alike—formed an integral part of the Army's religious functions (R. 582, 586). The court then granted defendant's motion to dismiss for want of jurisdiction (A. 8a), holding that §702 of the statute, 42 U.S.C. §2000e-1, exempts a religious organization such as the Salvation Army from any liability for any species of discrimination, despite clear statutory language in §702 that the exemption is limited to religious discrimination (A. 8a). The court, furthermore, assessed all costs against petitioner (A. 29a).

The court of appeals sharply disagreed with the district court on almost every issue. It found that the Army, though a religious organization, is an employer engaged in an industry affecting commerce, and as such may not escape the coverage of social legislation by showing that it was created for religious purposes (A. 15a); that petitioner was an employee of the Army (A. 17a); and that Congress did not intend §702 to exempt religious organizations from liability "for discrimination against its employees on the basis of race, color, sex or national origin with respect to their compensation, terms, conditions, or privileges of employment" (A. 18a).

Notwithstanding its finding on Congress' intent, *supra*, as shown by the statute's legislative history,[5] the court of appeals affirmed the judgment below. Invoking the doctrine of *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346 (1936), (A. 25a), the court determined that the question of the constitutionality of Title VII's application to petitioner and the Army could be avoided by finding that "Congress did not intend, through the non-specific wording

[5] The legislative history of Title VII reveals a conscious choice on the part of Congress to limit §2000e-1 (§702) exemption for religious organizations only to discrimination based on religion (A. 18a). The original House version of the section, then referred to as §703, provided for the broader all-encompassing exemption which respondent wishfully seeks to invoke. Congress specifically limited the House version in the final draft of the Act, however, and Senators Humphrey and Dirksen, both principal drafters of that final version, interpreted the revision as permitting religious organizations to choose persons to perform religious activities *only* on the basis of those persons' religion, not on the basis of their race, color, national origin, or, as is pertinent here, sex (A. 18a). See 110 Cong. Rec. 12722, 12818. The legislative history of the 1972 Equal Employment Opportunity Act, discussed *infra* n. 12, only reinforced this interpretation.

of the applicable provisions of Title VII, to regulate the employment relationship between church and minister" (A. 25a).

On petition for rehearing, the court of appeals reversed the lower court's assessment of costs against petitioner, ordering each party to bear its own costs (A. 34a). Petitioner had originally been allowed to begin her action *in forma pauperis,* as she was then still in the employ of the Salvation Army (R. 569). Upon her application for a copy of the transcript of the evidentiary hearing, however, the district court determined that petitioner's financial circumstances had so changed due to her Army discharge and her subsequent assumption of a school teacher's job, that her right to proceed *in forma pauperis* no longer existed (R. 571), despite her limited means and small income.

The district court also ordered that petitioner's motion for leave to appeal *in forma pauperis* be denied, although she was at the time $3,000 in debt (A. 31a). The court noted that her debts were of a non-recurring nature, and stated of its order: "While it may impose a hardship, it is no more so under the facts set forth than other litigants endure" (A. 31a). The court's order, on appeal to the Fifth Circuit, was affirmed, although petitioner was allowed to proceed on the original typewritten record and typewritten briefs (R. 612).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Court of Appeals has decided important federal questions involving the constitutionality of certain provisions of the equal employment opportunity statutes, and the scope of the statutory exemption granted by Congress to religious organizations, which questions should be settled by this Court.

I.

The critical question in this case is whether the First Amendment gives a license to churches and other religious organizations to engage in racial, sexual, or national origin discrimination against their employees. The sex discrimination alleged in this case, which must be assumed to be true in the light of the district court's dismissal of the complaint on jurisdictional grounds, would be concededly illegal in the case of any non-church employer. The effect of the decision below is to leave thousands of employees of religious organizations uncertain of whether they are or are not protected by the equal employment opportunity statutes.

This is not a case where a church, or one or more of its adherents, are aggrieved by a statute which imposes a burden on the exercise of religious beliefs or practices. Cf. *Wisconsin* v. *Yoder,* —— U.S. ——, 32 L. Ed. 15 (1972); *Sherbert* v. *Verner,* 374 U.S. 398 (1963); *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943). On the contrary, Congress expressly recognized in §702 that a religious organization should be able to make selections and rejections of employees—all em-

ployees—and to control their employment relationship, based on secularly unreviewable *religious* choices. Nor is there any claim made that the religious tenets of the Salvation Army authorize or require the unequal treatment of women.[6] On the contrary, Salvation Army doctrine requires equal treatment of women. See p. 7, *supra*.[7] What we have then is a religious organization which employs thousands of persons, and which is already authorized by law to discriminate on religious grounds, insisting—without any claim of religious liberty being infringed—that it should also have the right to discriminate on grounds of sex,[8] race or national origin. The Salvation Army is plainly asking for more than the free exercise of religion—it is asking for a preferred status of total immunity from the equal opportunity laws.

The court below reached a conclusion which allows this result because it failed to correctly evaluate the various constitutional and public interests involved. Citing *Presbyterian Church* v. *Hull Church*, 393 U.S. 440 (1969) and its predecessors, the court below apparently assumed that the mere fact that a church is involved in litigation with

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[6] Such might be the hypothetical case of a black person complaining of racial discrimination by a Mormon church organization, where the employer defends on the grounds that Mormon doctrine requires the discriminatory treatment.

[7] Indeed, it may be noted that the Salvation Army has historically bestowed high rank on some women. Cf. Shaw, *Major Barbara*.

[8] The Salvation Army would undoubtedly deny that it practices sex discrimination, and would point to its doctrinal requirement of equality for women. But in respect of discrimination on grounds of sex, there may well be the same difference between theory and practice as this Court has often noted in respect of discrimination on grounds of race. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431-32 (1971).

an employee who performed ministerial functions insulates it from judicial scrutiny, as a matter of constitutional right. But the *Hull* line of church property cases is clearly limited to disputes which "implicate controversies over church doctrine and practice." 393 U.S. at 445. The civil courts may indeed have "*no* role in determining ecclesiastical questions in the process of resolving property disputes," *id.* at 447. But it simply defies logic to apply this doctrine in such a manner as to immunize a religious corporation where there is *no* question of church doctrine or church practice, where there is no dispute over title to church property, where there is no ecclesiastical question at all.

It is simple enough to invoke the image of the "wall of separation" between church and state as the court below did (A. 19a). But it is axiomatic that every contact or confrontation between government and religion does not compel government to retreat, at the peril of unconstitutionality. In the words of Mr. Justice Frankfurter, religious freedom "does not and cannot furnish the adherents of religious creeds entire insulation from every civic obligation." *McGowan* v. *Maryland,* 366 U.S. 420, 461-62 (1961) (concurring opinion). See *Braunfeld* v. *Brown,* 366 U.S. 599 (1961);[9] *Prince* v. *Commonwealth of*

[9] Chief Justice Warren wrote in *Braunfeld*:

> "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature. Statutes which tax income and limit the amount which may be deducted for religious contributions impose an indirect economic burden on the observance of the religion of the citizen whose religion requires him to donate a greater amount to his church; statutes which require the courts to be closed on Saturday and Sunday

Massachusetts, 321 U.S. 158 (1944); *Jacobsen* v. *Massachusetts*, 197 U.S. 11 (1905); *Reynolds* v. *United States*, 98 U.S. 145 (1878).

Churches and other religious organizations have been held constitutionally subject to the Fair Labor Standards Act, *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F.2d 879 (7th Cir. 1954), *cert. denied*, 347 U.S. 1013 (1954); the National Labor Relations Act, *Cap Santa Vue, Inc.* v. *NLRB*, 424 F.2d 883, 887 (D.C. Cir. 1970); the Internal Revenue Code, *Parker* v. *Commissioner of Internal Revenue*, 365 F.2d 792, 795 (8th Cir. 1966); the Federal Food, Drug and Cosmetic Act, *Church of Scientology of California* v. *Richardson*, 437 F.2d 214, 217 (9th Cir. 1971); see also *U. S.* v. *Kuch*, 288 F. Supp. 439 (D.D.C. 1965) (holding against an "ordained minister of the Neo-American Church", *id.* at 442, who claimed the constitutional right to use hallucinogenic drugs as part of a religious ceremony). Yet without any analysis of these cases and the doctrines which they reflect, much less any rationale of distinction, the court of appeals in this case of first instance effectively swept away the protection of the federal anti-discrimination statutes from thousands of intended beneficiaries.[10]

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impose a similar indirect burden on the observance of the religion of the trial lawyer whose religion requires him to rest on a weekday. The list of legislation of this nature is nearly endless." 366 U.S. at 606.

[10] The court below observed that its decision is restricted to the "church-minister relationship" (A. 10a). Yet no such distinction may be found in any of the above-cited cases. Indeed *Prince*, *Parker* and *Kuch*, all *supra*, all involved persons regarded by their respective churches as ordained ministers. And in *Gallagher* v. *Crown Kosher Super Market*, 366 U.S. 617, 630-31 (1961), a companion case to *Braunfeld* and *McGowan*, *supra*, the unsuccessful

The court below recognized the propriety of the compelling governmental interest analysis of *Sherbert* v. *Verner, supra* (A. 19a). But it misapplied the first two elements and left out the vital third element. The *Sherbert* test requires, first, a determination of whether there is an infringement on free exercise; second, a determination of whether the governmental interest which causes the infringement is merely "rational" or, in fact, "compelling"; and, third, an analysis of whether or not the governmental interest could be satisfied by a less onerous alternative. See *In re Jennison,* 375 U.S. 14 (1963), *on remand* 267 Minn. 136, 125 N.W.2d 588 (1963). In this case, (1) there is no visible infringement of religious liberty, but merely a claim by the Salvation Army that any governmental regulation violates its religious liberty; (2) the governmental interest in eradicating invidious discrimination based on sex, race or national origin, expressed in Title VII of the Civil Rights Act of 1964, and reflecting a bitter history of strife and divisiveness with which all are familiar, is no less than *compelling;* see *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241, 245-46 (1964); (3) there has been no effort to demonstrate the existence of a less onerous alternative, and we submit that there is none. Compare *Sherbert* v. *Verner, supra; In re Jennison, supra.*

In sum, the courts below appear to have been chilled by dire predictions of raging torrents of religious strife. See Brief of Defendant-Appellee in court of appeals, p. 30; Brief of National Headquarters of Salvation Army, as

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plaintiffs included orthodox rabbis who complained that the Massachusetts Sunday Law interfered with and greatly complicated their rabbinical functions.

amicus curiae, pp. 26-27, 40-41. It is perhaps not unnatural for any employer to resist government regulation and expansion of employee rights with every possible argument. See *Associated Press* v. *NLRB*, 301 U.S. 103 (1937); *Polish National Alliance* v. *NLRB*, 322 U.S. 643 (1944).[11] But it is no service to the cause of religious liberty to allow its invocation to undermine the strong federal policy of equal employment opportunity for women. See *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971); *Mengelkoch* v. *Industrial Welfare Commission*, 442 F.2d 1119, 1126-27 (9th Cir. 1971); *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 236 (5th Cir. 1969). This Court should grant certiorari and properly settle the question in a manner which will safeguard equal employment opportunity without in any way damaging religious liberty.

II.

Certiorari should also be granted because the court of appeals, in its announced effort to avoid a constitutional decision, misapplied the doctrine of *Ashwander* v. *Tennessee Valley Authority*, *supra*. The court of appeals first considered the plainly erroneous holding of the district court that the Salvation Army was totally exempted by §702 (A. 7a). Review of the legislative history compelled the conclusion that only a limited exemption was intended—for religious discrimination—and no more. The court below

[11] A newspaper will not be insulated from otherwise valid regulation of economic activity merely because it also engages in constitutionally protected dissemination of ideas. *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 155-56 (1951). The same principle does not insulate a newspaper from compliance with §804(c) of the Civil Rights Act of 1968, 42 U.S.C. §3604(c), which prohibits the publication of discriminatory advertisements. *U. S.* v. *Hunter*, —— F.2d —— (4th Cir. 1972), 40 U.S.L.W. 2738 (Apr. 27, 1972).

was clearly correct and its decision is supported by even more legislative history than that which was cited.[12]

Then the court of appeals considered whether the religion clauses of the First Amendment allowed a religious organization to be subject to any anti-discrimination regulation at all. It is clear from the opinion below that the court of appeals concluded that the Constitution protected the Salvation Army in any sex discrimination it wished to practice on Mrs. McClure. But after marching up the hill, and then down again, the court of appeals stops just before it reaches

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[12] See n. 5, *supra*. §702 was amended in 1972, and now reads as follows:

"This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

Most significant was an amendment offered by Senator Ervin which would have provided a complete exemption from Title VII to religious organizations, exactly the position for which the Salvation Army contends. The Senator described his proposed amendment as follows:

"An amendment that says the EEOC shall have no jurisdiction at all over religious institutions . . . I would allow the religious corporation to do what it pleased . . . I am trying to take the political hands of Caesar off all religious associations and off all religious societies. I am trying to take them even off the National Council of Churches." (Cong. Rec. S. 919, Feb. 1, 1972)

The amendment, however, was soundly defeated in the Senate by a vote of 55 to 25.

The legislative history of the amendment makes it crystal clear that Congress understood that religious organizations "remain subject to the provisions of Title VII with regard to race, color, sex or national origin." Conference Report, Section-by-Section Analysis, Cong. Rec. (H. 1862), March 8, 1972. C.C.H., New 1972 Equal Employment Opportunity Law—With Explanation, ¶511.

its intended destination and concludes with an unexplained invocation of the *Ashwander* doctrine. Rather than hold the statute unconstitutional, in accordance with its apparent conviction, it holds without explanation that Congress did not intend to do that which the words of §702 plainly indicate Congress did intend (A. 25a).

Perhaps the court is implying that Congress only intended non-minister employees of churches to be covered. But what about the part-time minister, or the adherents of churches all of whose members regard themselves as ministers? Cf. *Prince* v. *Commonwealth, supra.*[13] Is every Jehovah's Witness employed in the Brooklyn, New York printing plant of the Watchtower Bible and Tract Society to be subject to racial and sexual discrimination because of "ministerial" status?

But there is no support in the legislative history for the court's strained construction. And Mr. Justice Brandeis, the author of the *Ashwander* doctrine, never intended an alternative statute-saving construction, unless it was "fairly possible". 297 U.S. at 348. Mr. Justice Cardozo warned in *Moore Ice Cream Co.* v. *Rose,* 289 U.S. 373, 379 (1933):

> "But avoidance of a difficulty will not be pressed to the point of disingenuous evasion. Here the intent of the Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power. The problem must be faced and answered."

Mr. Justice Harlan, in his concurring opinion in *Welsh* v. *United States,* 398 U.S. 333, 347 (1970), discussed the limits of the *Ashwander* doctrine:

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[13] As of 1969, the Jehovah's Witnesses were reported to have 359,146 members in the United States. *1972 Information Please Almanac, Atlas and Yearbook,* p. 153.

> "I cannot subscribe to a wholly emasculated construction of a statute to avoid facing a latent constitutional question, in purported fidelity to the salutary doctrine of avoiding unnecessary resolution of constitutional issues . . . " *Welsh, supra,* 398 U.S. at 354.

The fault with the decision below is that neither the words nor the legislative history, nor any elucidation of legislative policy, justify the court's unexplained construction. This Court should grant certiorari and declare that the constitutional question must be met, and, we respectfully submit, the constitutional question should be decided in petitioner's favor. See pp. 14-19, *supra.*

III.

The court of appeals noted that Mrs. McClure had a second grievance against her employer in addition to her claim that she was the victim of illegal sex discrimination. She also alleged that she was discharged because of her complaints of discriminatory practices (A. 11a). Retaliatory or punitive discharge is expressly and independently prohibited by §704(a) of Title VII, and it is therefore unfortunate that neither of the courts below ruled on this question.

Nevertheless the effect of the ruling seems to be that the Salvation Army's status as a church gives it plenary authority not only to discriminate on grounds of race, sex or national origin, but to have the unlimited and unreviewable power to discharge or otherwise retaliate against any employee who dares to complain about discrimination. This is plainly contrary to the statutory policy of encouraging access to the Equal Employment Opportunity Commission,

Pettway v. *American Cast Iron Pipe Co.*, 411 F.2d 998, 1005 (5th Cir. 1969). Obviously, this policy embraces all charges, false as well as true, and certainly charges which are not within the coverage of the statute as well as those that are clearly covered. *Pettway, supra,* 411 F.2d at 1007. The courts below, therefore, erred in not recognizing that even if the Salvation Army's status as a church exempted it from the §703 claim of sex discrimination, it did not exempt it from the §704 claim of retaliatory discharge.

In an analogous context involving employee grievances under the National Labor Relations Act, this Court was unanimous in striking down a Florida statute which denied unemployment insurance to workers who were subjected to retaliatory discharge after filing NLRB complaints. *Nash* v. *Florida Industrial Commission,* 389 U.S. 235, 238 (1967): "Congress has made it clear that it wishes all persons with information about such practices to be completely free from coercion against reporting them to the Board." *Ibid.* The federal policy of protecting access to the EEOC is expressed in even broader language, *Pettway, supra,* 411 F.2d at 1006, n. 18. Certiorari should be granted so that this Court can settle this important federal question.

IV.

The district court, in denying petitioner's motion for leave to appeal *in forma pauperis* noted that her hardship in this case was no greater than that which other litigants normally endure (A. 31a). Petitioner, however, should not have had to undergo even that amount of hardship, for in suing under Title VII of the 1964 Civil Rights Act she was acting "not for [her]self alone, but also as a 'private attorney general'." *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400, 402 (1968).

When petitioner brought her suit, and when she appealed the dismissal of her complaint to the Fifth Circuit, the EEOC was not empowered to enforce the act it was established to administer, but had to rely for enforcement on private individuals or on the Attorney General.[14]

To encourage individuals to assume the enforcement burden for the Act, Congress authorized the courts in §706(e), 42 U.S.C. §2000e-5(e), to appoint an attorney for the plaintiff and/or to allow commencement of plaintiff's action without fees, costs or security, *supra,* p. 6. The specific inclusion in Title VII of what is in effect an *in forma pauperis* provision, despite the existence elsewhere of a recognized statute dealing with *in forma pauperis* proceedings, 28 U.S.C. §1915, can only suggest Congress' strong concern that limited means and small income not stand as a deterrent to valid action under that title. *Edmonds* v. *E. I. duPont de Nemours and Co.,* 315 F. Supp. 523, 525 (D. Kans. 1970). Complainants under Title VII should be free to sue without fear of incurring costs that would, as in petitioner's case, set them deeper into debt.

Although the court of appeals, in response to the petition for rehearing (A. 34a), eased petitioner's burden to the extent of not requiring her to pay the Salvation Army's costs, she was still obliged to pay her own costs, an obligation, which, we submit, she should not have had to undertake at all.

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[14] 42 U.S.C. §2000e et seq. did not include the power to institute suits. On March 13, 1972, Congress amended Title VII so as to give the EEOC such power: "§706(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a governmental agency, or political subdivision named in the charge."

Certiorari should be granted for the purpose of deciding what degree of indigency a Title VII litigant must satisfy before the court will allow him or her to proceed *in forma pauperis*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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* Attorneys for petitioner gratefully acknowledge the valuable research and editorial assistance of Ms. Helen Rosenberg, second year student at New York University School of Law.

** Passed New York bar examination, and currently awaiting admission.

APPENDIX

APPENDIX

Opinion of the United States District Court for the Northern District of Georgia

Mrs. Billie B. McCLURE

v.

The SALVATION ARMY.

Civ. A. No. 13955.

United States District Court,
N. D. Georgia,
Atlanta Division.

March 8, 1971.

roceeding on motion of defendants smiss civil rights complaint for of jurisdiction. The District , O'Kelley, J., held that not only is lvation Army a "religious corpora- within civil rights statute provid- hat equal employment provisions ot apply to a religious corporation espect to employment of individu- perform work connected with ng on of its religious activities, y allowance, salary, or funds re- by its officers, their work assign- or places of employment are mat- f "religious activity" within stat- that officers work voluntarily for us reasons, attend special school prepare them for their work, and onsidered as ordained ministers attending to rituals of a temporal .

otion sustained.

Civil Rights ⇐1

Not only is the Salvation Army a "religious corporation" within civil rights statute providing that equal employment provisions shall not apply to a religious corporation with respect to employment of individuals to perform work connected with carrying on of its religious activities, but any allowance, salary, or funds received by its officers, their work assignments or places of employment are matters of "religious activity" within statute, in that officers work voluntarily for religious reasons, attend special schooling to prepare them for their work, and are considered as ordained ministers when attending to rituals of a temporal nature. Civil Rights Act of 1964, §§ 701 et seq., 702 42 U.S.C.A. §§ 2000e et seq., 2000e-1.

See publication Words and Phrases for other judicial constructions and definitions.

Haas, Holland, Freeman, Levison & Gilbert, Atlanta, Ga., for plaintiff.

Hansell, Post, Brandon & Dorsey, Atlanta, Ga., for defendant.

OPINION AND ORDER INCLUDING FINDINGS OF FACT AND CONCLUSIONS OF LAW

O'KELLEY, District Judge.

The plaintiff, a female officer of the Salvation Army, filed a Complaint pursuant to Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e.

The defendant has filed its answer, and along with that, a motion to dismiss for want of jurisdiction, *inter alia*. It argues that it is a religious body or society as contemplated by the statute con-

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fied in 42 U.S.C. § 2000e–1 and that its employees and those of the officers of the Army are religious in nature and thus exempt under the law.

The pertinent part of that section reads:

"This subchapter shall not apply * * * to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities * * *."

A hearing was held as to that issue on November 23, 1970, and the Court makes the following findings of fact and conclusions of law based upon the evidence presented at that time.

1. FINDINGS OF FACT

The defendant is a corporation organized in 1927 under the laws of the State of Georgia and formed for the purpose of the location of a church in the County of Fulton, State of Georgia, and for the purpose of promoting the cause of Christian religion, charity and education in other localities throughout the State of Georgia and elsewhere. The Southern Territory of The Salvation Army extends from the border of Pennsylvania down to Guatemala in Central America and is composed of eleven divisions. A division is commanded by a division commander who has a staff and who is responsible to the Territorial Headquarters which for the Southern Territory is located in Atlanta, Georgia. Under the divisions there are corps ranging in number from seven to fifty. There are many corps within the Southern Territory.

The Salvation Army Corps is a family center for the dissemination of the Gospel, for the development of Christian life, and for the outreach in the particular community in which it is located. It is similar to any other church. It has a senior segment, a youth segment or Christian education department, and many other things that other churches have, including a structure for lea ship training, and emergency trai for disasters. The commanding of of a corps acts as the "pastor" of corps, but both the corps and every other officer of the a tioned in the locality perform the fu tion of preaching to the congregat

The defendant conducts a Daily V tion Bible School, which is also a nor church function. There is a H League Department which is the equ lent of training for home service an particularly for married women. T are senior citizens' clubs in practic every corps. There is also a Salva Army band unit and a chorus in mos the corps. There is a group of local ficers in most corps known as the C Council. There is also a group kn as the Census Board which operates affairs of the corps.

The corps is also called upon t many things outside of its preac ministry. There is a regular prog for the visitation of homes. Foo provided to the needy and referral the sick are made to doctors and h tals and other charitable functions.

There are approximately 1300 off serving in the Southern Territory. officer is one who has first receiv divine call from God and has bee cepted and trained and commissione a Salvation Army officer. Being missioned in The Salvation Army i equivalent to ordination. Officer The Salvation Army are not perm to have any outside employment ever. Training of the officer consis a two-year session of training. Th ficer is equivalent to the clergy o church and can perform the four ceremonies of the Army which in the swearing in of soldiers, perfor marriages, burials and dedicatio children. Salvation Army officers served as chaplains in World W World War II and in Vietnam.

Officers are also divided into tw sic classifications as to assign field and staff officers. Their

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tinction in wages or allowances, but re is a distinction in the duties per-rmed. A field officer has the same mmon responsibility of a parish priest of a Presbyterian or Baptist clergy-n, being responsible for a congrega-n. Staff officers are similarly quali-d to perform the ceremonies of the urch, hold retreats and attend offi-rs' councils, but are assigned specific nctions in divisional or territorial adquarters.

While The Salvation Army officer is uivalent to the clergy of another urch, the Salvation Army soldier is uivalent to the laity of another urch. The Salvation Army has vari-s steps that one must take before com-g to soldiership. A person who is not filiated with any church, who does not im the Christian experience, must rst go through a training program, lled training for senior soldiership. ldier applicants must become familiar ith the doctrines, the steps that a per-n must take before becoming a Chris-an, must undergo a preliminary proba-on time, be reviewed by a census ard, and then be accepted as a soldier a ceremony conducted at a public eeting under The Salvation Army flag d under the flag of the Country. his is called the swearing-in ceremony d is used by The Salvation Army as s form of acceptance into the church. soldier is a layman and can be any per-n of any background in the communi-.

A person who does not have any other urch affiliation, but is not prepared to ake a commitment for Christian serv-e and witness as a Christian, but who ants to have his name on a church roll r the purpose of burial, is known as n "adherent." In addition to adher-nts, there are persons known as "friends" who attend The Salvation rmy services, but never become affili-d in any way. Numerous others are filiated with the Army as "volun-ers," lending moral support to The lvation Army through membership on Advisory Boards and Women's Auxiliaries.

There is also a classification known as "employees," of which there are approximately 3,000 in the Southern Territory. Employees may be of any race, any background, any origin, and they generally bring with them certain needed skills, ranging from doctors to laborers, but they are never commissioned officers of the Army.

The Salvation Army has certain Orders and Regulations which serve as guidelines by which it operates. These Orders and Regulations outline the conduct of individuals, the steps to be taken in the performance of ceremonies, how to conduct meetings, etc. The Salvation Army has its own doctrine which is contained in The Salvation Army Handbook of Doctrine.

The original mission of The Salvation Army has remained unchanged. It is to seek the unsaved, to secure the commitment of those who are determined to live a Christian life, to give such people an opportunity for serving, remembering that membership in The Salvation Army, even as a soldier, imposes a greater burden upon an individual than he would assume by belonging to another church. The Salvation Army encourages the wearing of a uniform regularly and the participation in open air meetings. The soldier is identified by his uniform and marked out as a Salvationist. The Army has four major ceremonies: the swearing-in of soldiers, marriage, burial, and dedication of children. Religious services are held on Sundays and other days. They have all the elements of a Christian witness service. They have a preaching part, congregational singing, scripture reading, prayer and the invitation to be saved.

Mrs. Billie B. McClure was enrolled as a Junior Soldier as a child in The Salvation Army and attended religious meetings and services. Her original application to The Salvation Army, dated 1961, was not approved. She renewed [illegible]

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state presented her application to the Army for officership on or about April 15, 1965. She finished four years of college, going two years to San Angelo Junior College, and finished the remainder of her work at North Texas State University in Denton, Texas, receiving a bachelor of science in elementary education. She received a teacher's certificate from the State of Georgia and is presently engaged in teaching school with the Newton County Education Department in Newton County, Georgia.

Mrs. McClure entered The Salvation Army Officers' Training School in September of 1965. She studied the Bible and doctrine, bookkeeping, and Orders and Regulations for officers. Courses in music, band, songsters, education, religious education, publicity and public relations were also taught, as were certain elective courses, such as creative writing. She was first sent into the field to serve as a Salvation Army Officer (Cadet Lieutenant) in June, 1966; her first assignment was at Camp Hoblitzele in Texas. In August of 1966 she was assigned to Little Rock, Arkansas as Commanding Officer of the Little Rock Citadel Corps. She served in Little Rock from August, 1966, to May, 1967. She was next assigned as Commanding Officer of the Corps at Pascagoula, Mississippi, from June, 1967, to January, 1968. She next served as the Casework Supervisor in the Georgia Division in Atlanta, Georgia, from February 1, 1968, through October, 1969. Her final assignment in The Salvation Army was as a secretary in the Public Relations Department of the Southern Territorial Headquarters. The plaintiff, Mrs. McClure, regarded herself as a minister of the Gospel and as performing a religious function for the church at all times.

While serving as Commanding Officer of the Citadel Corps in Little Rock, Mrs. McClure was in charge of all senior and young people's character building programs. She also had charge of corps finances for local purposes and territorial appeals. She was responsible for the sale of The Salvation Army literature and was responsible for the [illegible] monthly reports that had to be [illegible] Divisional Headquarters. She was authorized to perform all of the religious ceremonies of The Salvation Army, including the swearing-in of soldiers, dedicating of babies, conducting all religious services, conducting marriages and officiating at funerals. She [illegible] in one member at Little Rock. She served as the Commanding Officer of the Pascagoula, Mississippi Corps. Her functions as a minister were the same in Pascagoula as at Little Rock except that they were enlarged somewhat because of her responsibility for all of the welfare and public relations and fund-raising programs. She conducted the Sunday School and a morning worship service on Sunday. She had a Bible class on Sunday afternoon for teenagers who were Corps Cadets. She also held a worship service on Sunday evening and a prayer meeting on Wednesday nights. In addition to these services, Mrs. McClure had interviews with applicants for emergency welfare assistance. There were also constant calls from county and state welfare agencies asking the Salvation Army to participate in various community services.

Mrs. McClure requested in September of 1967, while in Pascagoula, to be relieved from corps work because she did not feel that she could handle all of the work that had to be conducted. She requested staff duty.

Mrs. McClure's superior officer, Casework Supervisor in Atlanta, Georgia, was Major James Childs, who was the administrator of the Welfare Department. Mrs. McClure's duty in this position was to coordinate the Emergency Welfare Service for the Metropolitan Area of Atlanta through the Welfare Department and emergency welfare service and family welfare service.

While working as Casework Supervisor, Mrs. McClure estimated that she spent four hours a week in corps activities; an hour for teaching [illegible]

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...ol class, an hour for work in Bible ..., an hour for band practice, and an ... for song practice. She attended ...rvices at the Temple Corps on Seminole ...enue in Atlanta on Sunday mornings ...a member of the Temple Corps. She ...o volunteered to be a Sunday School ...cher at the Temple Corps.

...In her last assignment in the South... Territorial Headquarters, Mrs. Mc... ...re worked primarily as a secretary in ... Public Relations Department.

...Mrs. McClure felt that she was the ...ritual leader of both the congrega... ...s in Little Rock and Pascagoula ...le serving as the Corps commander ...these respective corps. While serving ... Casework Supervisor in the Geor... ... Division at Atlanta, she conducted ...yer services with the people that she ...s visiting and assisting, and she felt ...t these religious activities were an ...portant part of her casework minis... ... While serving in her last assign... ...nt in the Public Relations Depart... ...nt at Territorial Headquarters, she ...ld engage in a prayer service known ...her as a "knee drill prayer meeting." ... McClure considered herself as per...ming a religious function for The ...ation Army, even while sitting be... ...d a typewriter merely typing a letter. ...e was serving as a commissioned offi... ...nd as an ordained minister of the ...ation Army in her final job assign... ...nt in the Public Relations Depart... ...nt of the Southern Territorial Head...arters.

...Mrs. McClure's officership with The ...ation Army terminated on July 19, ...

II. ISSUES AND OPINION

...Thus, the issues brought to a head are ... First, is The Salvation Army a re...ion, and second, were the activities ...ursued by Mrs. McClure of a reli... ...s nature?

...The Salvation Army has always been ...wn as a charitable body, but the ...tion of its being a religion has rare...

The rights guaranteed under the First Amendment of our Constitution are inalienable and personal. But the question of what is a religion as interpreted by the law has remained hazy throughout this country's existence. There have been various definitions for different purposes such as the test for a conscientious objector.

Without strict guidelines, nevertheless, this Court is of the opinion that The Salvation Army is a religion regardless of its lack of traditional houses of worship. The Salvation Army has been referred to as a body which practices religion. This was in a strong dissenting opinion in Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L. Ed. 645 (1942).

But, more to home, The Salvation Army is a corporation organized and existing under the laws of Georgia formed for the purpose of the location of a church in Fulton County and for the purpose of promoting the cause of Christian religion, charity and education in other localities, in and out of Georgia.

The Supreme Court of Georgia has likewise held The Salvation Army to be a religion. In Bennett v. City of LaGrange, 153 Ga. 428, 433, 112 S.E. 482, 485 (1922) it ruled:

> "A religious sect or denomination is one having a common system of faith. State v. Township 9, 7 Ohio St. 2. The term 'church' is one of very comprehensive signification, and imports an organization for religious purposes, for the public worship of God. * * * The Salvation Army is a benevolent and religious institution. It is likewise a church on wheels. It has the custody and control of all the temporalities and property belonging to the Salvation Army in the United States, and the revenues therefrom. It administers these revenues in accordance with its discipline, rules and usages. Its entire receipts, revenues and emoluments are devoted exclusively to its benevolent and philanthropic purposes, with the exception of a mod-

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erate and reasonable compensation to those conducting and managing its affairs. Its work is primarily directed to the spiritual, moral, and physical reformation of the working classes, to the reclamation of the vicious, criminal, dissolute, and degraded, to visitation among the poor, lowly, and sick; and to the preaching of the gospel and the dissemination of Christian truth by means of open-air and indoor meetings. So it preaches the gospel. It disseminates Christian truth. *It is a church, a sect, and a religious institution.*" [Emphasis added.]

See also Salvation Army v. United States, D.C.N.Y.1956, 138 F.Supp. 914. Moreover, the plaintiff seems to have no issue with the Army's reference to itself as a religion.

We then come to the issue requiring a balance of duties by religious bodies to secular laws and the rights guaranteed by The First Amendment and granted under 42 U.S.C. § 2000e–1.

To decide whether the duties which a member of a religious group performs fall within the category of "religious activities" under § 2000e–1, is not an easy matter.

Nevertheless, to aid in deciding what is or is not religious activity, the Court looks to United States v. Kuch, 288 F. Supp. 439 on pages 443–444 (D.C., Dist. of Col., 1968) wherein the Court held:

"The dividing line between what is, and what is not, a religion is difficult to draw. The Supreme Court has given little guidance. Indeed, the Court appears to have avoided the problem with studied frequency in recent years. Obviously this question is a matter of delicacy and courts must be over careful not to permit their own moral and ethical standards to determine the religious implications of beliefs and practices of others. Religions now accepted were persecuted, unpopular and condemned at their inception."

"Subtle and difficult though the inquiry may be, it should not be avoided

for reasons of convenience. [illegible] need to develop a sharper line of demarkation between religious activ[illegible] and personal codes of conduct t[illegible] lack spiritual import. Those who s[illegible] the constitutional protections for th[illegible] participation in an establishment [illegible] religion and freedom to practice [illegible] beliefs must not be permitted the [illegible] cial freedoms this sanctuary may p[illegible] vide merely by adopting religious [illegible] nomclature and cynically using it a[illegible] shield to protect them when parti[illegible] pating in antisocial conduct that o[illegible] erwise stands condemned. In a co[illegible] plex society where the requirements [illegible] public safety, health and order m[illegible] be recognized, those who seek immu[illegible] ty from these requirements on re[illegible] gious grounds must at the very le[illegible] demonstrate adherence to ethi[illegible] standards and a spiritual discipline."

That Court further noted on page [illegible] that:

"The public interest is paramo[illegible] and if properly determined the C[illegible] gress may inhibit or prevent acts [illegible] opposed to beliefs even where th[illegible] acts are in accord with religious c[illegible] victions or beliefs. If individual re[illegible] gious conviction permits one to [illegible] contrary to civic duty, public he[illegible] and the criminal laws of the la[illegible] then the right to be let alone in o[illegible] belief with all the spiritual peac[illegible] guarantees would be destroyed in [illegible] resulting breakdown of society."

Getting to specifics, the Court in *Kuch* case, referred to examples of c[illegible] duct which is regulated by law with[illegible] offending the First Amendment.

"Mormons were not permitted [illegible] practice polygamy. Nor would [illegible] Constitution protect the practice [illegible] religions requiring infanticide, [illegible] killing of widows, or temple prost[illegible] tion, as some religions have done [illegible] the past. The vital significance [illegible] the constitutional protection of re[illegible] gion will be diluted by a degree th[illegible] erance that accepts the [illegible]

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which leave society helpless to
tect itself."

se were religious activities, at
to those sects, but is welfare work,
al work, and other normally secular
religious because it is done under
spices of the religious corporation,
The Salvation Army? Is a reli-
activity limited to ceremonial or
listic functions? Or, does it include
rt operations which people perform
day in the world of business?

the case of Prince v. Massachu-
supra, the law, as affirmed by the
, invaded the province of the
h. There, the Court explained that
gh the selling of literature was
dered a religious activity by de-
nts and one which the Court would
spute as being one of personal be-
it denied the children involved the
ege of selling literature if under
en. We refer to the decision be-
selling of religious literature was
dered a religious activity. That
may be distinguished from the
t case in its results. The statute
ed in the present case provides an
ption for religious organizations
ying its members in a religious ac-
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many more traditional religious
, laymen and laywomen who are
ers of the congregation volunteer
perform work of a secretarial, ad-
trative and clerical nature without
ensation, yet their work is not con-
d a purely religious function as
d be the work of the minister,
t or rabbi, but it could be work con-
d with the carrying out of its reli-
activities.

me visitation or in-town mission-
ork by laymen would be of a reli-
nature even though it may be per-
ed by laymen.

mbers of the officer corps of The
tion Army receive a pittance for
holy work but then do not many
s of various orders if they receive
ing at all.

Would not the teaching of a nun or priest in a parochial school be considered religious activity? We think that the nexus between the parochial school and the religious body would require that their work be called "religious activity."

Since the work of officers in The Salvation Army is voluntary for religious reasons, as stated by William E. Chamberlain, Commander of the Southern Territorial Headquarters in his affidavit of August 14, 1970, and in his testimony at the hearing, and since Mrs. McClure attended special schooling intended to prepare her for her work with The Salvation Army, and since she is considered an ordained minister of The Salvation Army, and having attended to some rituals of a temporal nature, the Court, in considering the uniqueness of the manner in which The Salvation Army practices its religion, holds that Mrs. McClure's activities, which might seem secular, such as secretarial work, are supportive of her overall role yet an integral part of the Army's purely religious functions and activities. The Salvation Army does not maintain great cathedrals or traditional houses of worship but take their message to the people, whether in welfare work, on the street, in a social services building or in a small church. Therefore, the Court feels that any allowance, salary, or funds received by the Officers, their work assignments or their places of assignment, among any other grievances Mrs. McClure may have, are matters of religious activity into which the Court may not inquire under prior decisions and § 2000e–1. It is significant to note that Mrs. McClure performed some functions which only an officer (ordained member) might perform. It is even more significant that plaintiff affirmed that she considered herself performing a religious function while doing certain mundane tasks, such as typing. These activities when considered as an integral whole, demonstrate adherence to ethical standards and a spiritual discipline.

LOSE TO EDGE

For these reasons, the Court concludes that the activities of Mrs. McClure were connected with, carried on by, or in the religious activities of The Salvation Army in accordance with 42 U.S.C. § 2000e-1.

Therefore, the Motion to Dismiss the Complaint for want of jurisdiction is sustained, and it is so ordered.

POOR COPY

Opinion of the United States Court of Appeals for the Fifth Circuit

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2270

MRS. BILLIE B. McCLURE,
Plaintiff-Appellant,

versus

THE SALVATION ARMY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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(March 17, 1972)

Before WISDOM, COLEMAN and SIMPSON, Circuit Judges.

COLEMAN, Circuit Judge: The Salvation Army is a church and Mrs. Billie B. McClure is one of its ordained ministers, see facts set forth in the published opinion of the District Court, *McClure v. The Salvation Army*, 323 F. Supp. 1100 (N.D., Ga., 1971).

Mrs. McClure brought suit below, dismissed for lack of jurisdiction, which requires a determination of

whether Title VII of the Civil Rights Act of 1964 [42 U.S.C., §2000e, et seq.] applies to the employment relationship between a church and its ministers and, if applicable, whether the statute impinges upon the Religion Clauses of the First Amendment.[1] Restricting our decision to the church-minister relationship and expressly refraining from any decision as to other church employees of a type not involved in this controversy, we affirm the judgment rendered below.

After undergoing a two year training period at The Salvation Army's Officers Training School, Mrs. McClure was commissioned as an officer [minister] in June, 1967. She then received various assignments within the Southern Territory, first as a Corps Commander, next as a Welfare Casework Supervisor in Divisional Headquarters, and finally as a secretary in the Territorial Headquarter's Public Relations Department.

After her officer status had been terminated by The Salvation Army, Mrs. McClure began a civil action against that organization in the United States District Court for the Northern District of Georgia, alleging that it had engaged in discriminatory employment practices against her in violation of Title VII.[2]

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[1]The First Amendment of the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *."

[2]Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a) reads as follows:

"(a) It shall be an unlawful employment practice for an employer —

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, con-

More specifically, she alleged that she had received less salary and fewer benefits than that accorded similarly situated male officers, also that she had been discharged because of her complaints to her superiors and the Equal Employment Opportunity Commission [EEOC] with regard to these practices.

She sought reinstatement, an injunction against further discriminatory practices, and a judgment for the alleged deficiency in compensation paid to her as compared to male Salvation Army officers whose responsibilities were equivalent to those she performed.

The Salvation Army moved to dismiss the complaint for want of jurisdiction in that (1) it was neither an "employer" nor a person engaged in an "industry affecting commerce" within the meaning of §§ 701(b) and (h)[3] of Title VII and (2) since it is a "religious

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ditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

[3]Section 701(b) of Title VII, 42 U.S.C. § 2000e-(b) reads as follows:

"(b) The term 'employer' means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a State or political subdivision thereof, (2) a bona fide private member-

corporation" for which Mrs. McClure had voluntarily agreed to perform "work connected with the carrying on by such corporation * * * of its religious activities", it was not subject to the provisions of Title VII by reason of §702 thereof.[4] There was also an answer, asserting, inter alia, that since it is a church, application of the provisions of Title VII to The Salvation Army under the circumstances presented by this action would constitute a violation of the First Amendment of the Constitution of the United States.

Mrs. McClure later filed a motion for leave to file an amended and supplemental complaint; to maintain the suit as a class action on behalf of all female officers and all former female officers of The Salvation Army

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ship club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26 * * *."

Section 701(h) of Title VII, 42 U.S.C. § 2000e(h) reads as follows:

"(h) The term 'industry affecting commerce' means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry 'affecting commerce' within the meaning of the Labor-Management Reporting and Disclosure Act of 1959."

[4]Section 702 of Title VII, 42 U.S.C. §2000e-1 reads as follows:

"This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution."

in the United States; and to add The Salvation Army, a religious and charitable organization operating in the United States as four separate corporations, each operating under the corporate name, "The Salvation Army", as a party defendant.

Action on this motion was delayed pending action on The Salvation Army's motion to dismiss for want of jurisdiction.

Upon a hearing on the motion to dismiss (at which both parties presented witnesses) the District Court found that The Salvation Army was a religion[5] and concluded that Mrs. McClure's activities "... were connected with carrying on of the religious activities of The Salvation Army" in accordance with §702 of Title VII. Apparently concluding that such a finding exempted The Salvation Army from liability for the alleged discrimination, the District Court then sustained the motion to dismiss for want of jurisdiction.

On appeal, neither Mrs. McClure nor the EEOC, as *amicus curiae*, question the Salvation Army's status as a religion or her status as a minister engaged in the religious or ecclesiastical activities of the church. However, they contend that the Army is not exempt from the prohibitions of Title VII and is therefore liable for discriminating against Mrs. McClure on the basis

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[5]For court decisions recognizing The Salvation Army's status as a religious organization see Salvation Army v. United States, 138 F.Supp. 914 (S.D., N.Y., 1956); Bennett v. City of LaGrange, 153 Ga. 428 (1922); Hull v. State, 120 Ind. 153, 22 N.E. 117 (1889).

of sex with respect to compensation, terms, conditions or privileges of employment.

The Salvation Army again contends, as it did in the District Court, that it is neither an "employer" nor is Mrs. McClure an "employee" within the definition of those terms as defined by Title VII. Should we disagree with this contention, it then urges that the exemption provided by §702 of Title VII applies to The Salvation Army "with respect to its officers (ordained ministers) performing work connected with The Salvation Army's religious activities". Were we to decide that the exemption provided by §702 is not applicable to the facts as presented by this appeal, The Salvation Army urges that the application of the provisions of Title VII to the relationship between it and its officers (a church and its ministers) is violative of the Religion Clauses of the First Amendment.

I

If the provisions of Title VII are to apply to the relationship between The Salvation Army and Mrs. McClure it is necessary that it be an "employer" engaged in an "industry affecting commerce" and that she be an "employee" as those terms are defined by §701(b) (f) and (h) of the Title.[6]

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[6]Section (f) of Title VII, 42 U.S.C. §2000e (f) reads as follows:
"(f) The term 'employee' means an individual employed by an employer."
See Footnote 3, *supra*.

In addition to not *specifically* excluding religious organizations from the term as defined, the intention of Congress to allow such an organization to qualify as an "employer" is shown by the fact that in subsequent provisions of Title VII, limited and specific exemption from the Title's prohibitions were provided for them. The effect of these provisions is to cause a religious organization qualifying as such to be considered as an "employer", and to eliminate only certain of their employment relations from the prohibitions of Title VII.

That The Salvation Army qualifies as an "employer" engaged in an "industry affecting commerce" is illustrated by the following facts: Employment figures for the Army show approximately 3,000 people located in the several states which comprise the territory which it classifies as "employees", whose gross annual earnings are over $7,000,000 plus an additional 1,330 officers which it classifies as "non-employees"; an interstate activity responsible for administering and expending funds in excess of $147,000,000, managing property holdings worth more than $62,000,000 as of 1969, and deriving an income of $30,000,000 a year, of which $9,000,000 is derived from interest, dividends, sales, and services; a paper, "The War Cry", is printed by the national organization and sold nationwide, which produces income.

The existence of these facts demonstrates that The Salvation Army, though a religious organization not organized to engage in commerce, is nevertheless an "employer" engaged in an "industry affecting com-

merce". Organizations affecting commerce may not escape the coverage of social legislation by showing that they were created for fraternal or religious purposes. *Polish National Alliance of the United States v. NLRB*, 322 U.S. 643, 64 S.Ct. 1196, 88 L.Ed. 1509 (1944); *Mitchell v. Pilgrim Holiness Church Corp.*, 7 Cir., 1954, 210 F.2d 879, cert. denied 347 U.S. 1013, 74 S.Ct. 867, 98 L.Ed. 1136 (1954).[7]

Because Title VII's definition of "employee" is not restrictive, the existence of such a status for a certain individual must turn on the facts of each case.

After filing an application, Mrs. McClure was selected by The Salvation Army as a candidate for officership. She was then trained in all phases of her duties for a period of two years. After her training was completed, she was commissioned as an officer. Her assignments to various positions in the Southern Territory were completely within the control of her superiors. Supervision over the performance of her work was maintained through the direct observance of a superior officer, the use of reports and the audit of certain records that were kept by her. At no time was she allowed to undertake a project without the approval of a superior officer. She was subject at all times to the right of termination retained by The Salvation Army. Her amount of compensation was governed by a national salary schedule set by The Salvation Army,

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[7]The Salvation Army did not seriously question its status as an 'employer' in its brief. However, we feel it is necessary to discuss its status as such.

which also provided her with workmen's compensation insurance.

Thus the record shows that Mrs. McClure was selected, employed, controlled, trained, and paid by The Salvation Army. When the existence of such factors is shown, the individual falls within the definition of "employee". See *Tarboro v. Reading Company*, 3 Cir., 1968, 396 F.2d 941, cert. denied 393 U. S. 1027, 89 S.Ct. 637, 21 L.Ed.2d 569 (1969); *Santa Rosa Island Authority v. F. Rust Smith & Sons, Inc.*, 5 Cir., 1962, 303 F.2d 576.

The Salvation Army's contention that Mrs. McClure is a volunteer because the terms of her application state that she will regard herself as such, ignores the fact that employment contracts cannot be used to waive protections granted to employees by an Act of Congress. See *J. I. Case Company v. NLRB*, 321 U.S. 332, 64 S.Ct. 576, 88 L.Ed. 762 (1944).

We next consider the effect of §702. This section provides certain employment relations with an exemption from the prohibitions of Title VII.

Mrs. McClure and the EEOC contend that the exemption permits a religious organization to discriminate only on the basis of religion. They contend that the section was intended to allow a religious organization to employ persons of a particular faith to perform work connected with the carrying on of their religious activities without otherwise violating the provisions of Title VII. Both the language and the legislative history of the section support this contention. The original House

version of §702 contained in H.R. 7152 provided a religious organization with a blanket exemption from the provisions of Title VII. This version reads as follows:

> "This title shall not apply to an employer with respect to the employment of aliens outside any State or to a religious corporation, association, or society."

This broad exemption for religious organizations proposed by the House was limited by Substitute Senate Amendment No. 656 which ultimately became law. Senator Humphrey, the Majority Leader of the Senate and a principal sponsor of the substitute amendment, explained that the Senate Amendment limited the blanket exemption given to religious organizations:

> "Section 704 formerly Section 703 and later renumbered as Section 702 has been amended to limit the general exemption of religious groups to those practices relating to the employment of individuals of a particular religion to perform work connected with the employer's religious activities ..." 110 Cong. Rec. 12818.

The language and the legislative history of §702 compel the conclusion that Congress did not intend that a religious organization be exempted from liability for discriminating against its employees on the basis of race, color, sex or national origin with respect to their compensation, terms, conditions or privileges of employment.

This view necessitates consideration of the constitutional issue.

II

Does the application of the provisions of Title VII to the relationship between The Salvation Army and Mrs. McClure (a church and its minister) violate either of the Religion Clauses of the First Amendment?

The Supreme Court has many times recognized that the First Amendment has built a "wall of separation" between church and State. Though that "wall of separation" between permissible and impermissible intrusion of the State into matters of religion may blur, or become indistinct, or vary, it does and must remain high and impregnable. In *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), it was said, "We could not approve the slightest breach".

Only in rare instances where a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate" is shown can a court uphold state action which imposes even an "incidental burden" on the free exercise of religion. In this highly sensitive constitutional area "'only the gravest abuses, endangering paramount interests, give occasion for permissible limitation'". *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed. 2d 965 (1963). Restrictions on the free exercise of religion are allowed only when it is necessary "to prevent grave and immediate danger to interests which the State may lawfully pro-

tect". *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). "[T]he power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom". *Cantwell v. Connecticut*, 310 U.S. 296, 304, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church.

It has long been the practice of The Salvation Army, as with many other religious denominations, to determine these matters which deal with the very terms of a minister's calling. Such a practice must be classified as both basic and traditional.

In *Watson v. Jones*, 80 U.S. 679, 13 Wall. 679 (1871), the Supreme Court began to place matters of church government and administration beyond the purview of civil authorities. In *Watson*, one of two factions struggling for control of church property had been recognized by the highest ecclesiastical body of the Presbyterian Church as the "regular and lawful" governing

body of the church. From a state court's decision that it was bound by the ecclesiastical ruling, the dissident faction appealed. The Supreme Court affirmed, stating:

> "... whenever the questions of discipline, or of faith or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." Id. at 727.

Over fifty years later in *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 50 S.Ct. 5, 74 L.Ed. 131 (1929), the petitioner was attempting to challenge a decision by the Archbishop of Manila, who had refused to appoint him to chaplaincy on the ground that, according to the Canon Law then in force, he did not possess the required qualifications. In upholding the Archbishop's interpretation of the Canon Law, the Supreme Court said:

> "* * * In the absence of fraud, collusion or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest have made them so by contract or otherwise. * * *." Id. at 16.

In *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed. 120 (1952), the principle announced by *Watson* and *Gonzalez* became a constitutional prohibition. Legislation had been passed which transferred administrative control of Russian Orthodox churches in North America from the Patriarch of Moscow to authorities selected by a convention of the North American churches. This resulted in appointees of the Patriarch of Moscow being denied the use and occupancy of St. Nicholas Cathedral in New York City. Holding the New York law to be an unconstitutional interference with the free exercise of religion, the Supreme Court stated that "legislation that regulates church administration, the operation of the churches [or] the appointment of clergy *** prohibits the free exercise of religion". Id. at 119.

The case was then remanded to the Court of Appeals of the State of New York, which ordered a retrial of the question of the appellee's right to use and occupancy of the cathedral on a common law issue assertedly left open by the Supreme Court's decision in *Kedroff*. The Court of Appeals rendered a decision holding that, under the common law of New York, the Patriarch's appointees were not entitled to exercise the right of use and occupancy granted to them by virtue of Canon Law. The Supreme Court again reversed, holding that constitutional principles prevent *the judiciary, as well as the legislature,* from interfering with the free exercise of religion. *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 80 S.Ct. 1037, 4 L.Ed.2d 1140 (1960).

Recently in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 89 S.Ct. 601, 21 L. Ed.2d 658 (1969), the Supreme Court warned that "* * * First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. * * *." Id. at 449.

A common thread runs through these opinions, which is best exemplified by those words used by the Supreme Court in commenting on its holding in *Watson v. Jones, supra*. For throughout these opinions there exists "a spirit of freedom for religious organizations, an independence from secular control or manipulation — in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. * * *." *Kedroff v. St. Nicholas Cathedral, supra*, at 116.

In her complaint, Mrs. McClure has charged that The Salvation Army engages in certain practices with regard to a minister's assignment, his salary, and his duties, which have been declared unlawful by Title VII. However, it would be useless to argue that these decisions are not matters of church administration and government and thus, purely of ecclesiastical cognizance.

An application of the provisions of Title VII to the employment relationship which exists between The Salvation Army and Mrs. McClure, a church and its minister, would involve an investigation and review of these practices and decisions and would, as a result, cause the State to intrude upon matters of church administration and government which have so many times before been proclaimed to be matters of a singular ecclesiastical concern. Control of strictly ecclesiastical matters could easily pass from the church to the State. The church would then be without the power to decide for itself, free from state interference, matters of church administration and government.

Moreover, in addition to injecting the State into substantive ecclesiastical matters, an investigation and review of such matters of church administration and government as a minister's salary, his place of assignment and his duty, which involve a person at the heart of any religious organization, could only produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment. As was said by Justice Clark in *Abington School District v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed. 2d 844 (1963), "the breach of neutrality that is today a trickling stream may all too soon become a raging torrent * * *".

We find that the application of the provisions of Title VII to the employment relationship existing between the Salvation Army and Mrs. McClure, a church and its minister would result in an encroachment by the State into an area of religious freedom which it is for-

bidden to enter by the principles of the free exercise clause of the First Amendment. Yet, "if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Ashwander v. Tennessee Valley Authority*, 1936, 297 U.S. 288, 346, 80 L.Ed. 688, 56 S.Ct. 466 (concurring opinion of Mr. Justice Brandeis). We therefore hold that Congress did not intend, through the non-specific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister. The order of the District Court sustaining The Salvation Army's motion to dismiss the complaint for want of jurisdiction is

AFFIRMED.

Order of the United States District Court Denying Application for a Copy of Transcript

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[CAPTION OMITTED]

On July 15, 1970, the plaintiff, Mrs. Billie B. McClure, an officer of the Salvation Army, filed a Complaint against the Salvation Army, pursuant to Title VII of the 1964 Civil Rights Act. This Complaint was allowed to be filed "in forma pauperis." Subsequent proceedings have been held in the case including an extensive hearing of evidence on November 23, 1970 and November 24, 1970.

Evidence was taken on the jurisdictional questions of defendant's motion to dismiss and the parties were ordered to submit additional arguments and authorities in support or opposition to the motion.

A 260-page transcript has been filed with the Clerk of the Court on December 16, 1970. On December 30, 1970, the attorney for the plaintiff presented to the Court an application for an order directing the court reporter to furnish plaintiff with a copy of the transcript of evidence.

At the hearing, the plaintiff testified that she was no longer an officer or employee of the Salvation Army and that she was now engaged as a school teacher in the public schools of Newton County, Georgia. The Court at that time indicated that the question of further proceedings *in forma pauperis* would be reviewed by the Court.

The plaintiff in supporting her application for a copy of the transcript, filed an affidavit setting forth that she has a net take-home pay as a school teacher of $380 and also has additional employment in an Atlanta department store which nets her approximately $47.00 every two weeks. The affidavit is silent as to the gross pay from either employment, but indicates there are taxes and *other deductions* withheld from the gross. The affidavit further sets forth extensive debts for medical expenses, taxes, furniture, and other debts commonly owed by the head of a household. The affidavit also states that the plaintiff has no real property nor assets other than her household furnishings and personal effects.

The questions presented to the Court are: (1) Assuming that the action is continuing *in forma pauperis,* can the Court direct the court reporter to furnish a transcript without charge or direct the United States to pay for the transcript? (2) Is the plaintiff a pauper and does the Court have the authority to modify its previous order allowing plaintiff to proceed *in forma pauperis.*

On the first question, there appears to be an abundance of authority that a copy of a transcript in a civil action is not to be furnished at government expense. *Estabrook* v. *King* (8th Cir., 1941), 119 F.2d 607. *Cheek* v. *Thompson,* D.C., La., 1940, 33 F.Supp. 497. *Ebenhart* v. *Power,* D.C., N.Y., 1969, 309 F.Supp. 660.

Title 28 U.S.C. §1915 allows the commencement of an action without prepayment of costs and fees or the necessity of giving security therefor. The courts in dealing with this question in a civil action, other than habeas corpus which is provided for by Title 18 U.S.C. §1825, have restricted costs and fees to "the ordinary fees and charges of

officers of the Court." *Cheek* v. *Thompson, supra.* While at the time of the *Cheek* case the court reporter was not an officer created by law and had no salary, the 8th Circuit in *Estabrook* v. *King, supra,* establishes the rule as being unchanged by §723(c) which authorizes the designation of an official court stenographer. The Court there states "the charges of a court reporter were not in their inception 'fees or costs,' within the meaning of" the statute and this Court cannot direct the United States to pay such a charge.

While the Court was justified in its original order allowing this action to be commenced *in forma pauperis* under §1915, the plaintiff's circumstances have so changed as to require in all further proceedings that the plaintiff be treated as any other party. The Court's authority for this action is set forth in *Spears* v. *Continental Bus System, Inc.,* Dallas, Texas, D.C., La., 1957, 148 F.Supp. 806.

For the foregoing reasons, plaintiff's application for an order directing the court reporter to furnish a copy of the transcript of proceedings of November 23 and 24 is hereby denied.

This 13th day of January 1971.

WILLIAM C. O'KELLEY
United States District Judge

Judgment of the United States District Court

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

[CAPTION OMITTED]

This action came on for consideration before the Court, Honorable William C. O'Kelley, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, granting defendant's motion to dismiss,

It is Ordered and Adjudged that this action be dismissed, that the plaintiff take nothing, and that the defendant, The Salvation Army, recover of the plaintiff, Mrs. Billie B. McClure, its costs of action.

Dated at Atlanta, Ga., this 12th day of March, 1971.

Filed & entered in Clerk's Office
March 12, 1971
Claude L. Goza, Clerk
By: JAR
Deputy Clerk

CLAUDE L. GOZA
Clerk of Court

By: JERRY RYLEE, Deputy

Order of the United States District Court Denying Application to Proceed *in Forma Pauperis*

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

[CAPTION OMITTED]

This application for leave to proceed *in forma pauperis* upon appeal was filed on April 9, 1971 pursuant to and simultaneous with a notice of appeal in the instant action.

Attendant with her application was her affidavit of inability to pay the costs. She has attached a schedule of income and expenses over the period of September 1970 through April 9, 1971. That schedule reflects an income for that 7-8 month span of $3,632.00 with expenses totaling $4,125.28. Proceeding beyond the schedule and the surface impressions obtaining thereto, the Court notes additional and modified figures in the verbage of the affidavit. Petitioner affirms a net monthly income (after taxes and deductions) from teaching, in the amount of $389.00, a net monthly income from Davison's Department Store in the sum of $98.00, receipt of $35.00 per month from a daughter for board, and $52.00 from the daughter for payment on applicant's house trailer. These sums total $583.00 net monthly income. She affirms that her present outstanding indebtedness is approximately $3,000.00. Assuming *arguendo* that her daughter did not contribute the $52.00 monthly payment toward the trailer, petitioner would still have an income of $531.00.

Petitioner has three children. The oldest, David, ostensibly is emancipated and resides in his own quarters. The other son Darryl is dependent on petitioner while the third child, Carla contributes $35.00 while living with petitioner and, according to petitioner's affidavit, plans to add another $52.00 per month. It is noted that many of the debts are non-recurring so that the current indebtedness should not remain static. With an approximate indebtedness of $3,000.00 and one dependent child, the petitioner could not be classed as a pauper when receiving $589.00 per month, notwithstanding the decisions cited by petitioner. See *Harris* v. *Harris,* C.A., D.C., 1970, 424 F.2d 806, *McKelton* v. *Bruno,* C.A., D.C., 1970, 428 F.2d 718 which reflect lower incomes and more dependents.

The Court cannot abide by petitioner's submissions of inability to assume the costs of appeal. While it may impose a hardship, it is no more so under the facts set forth than other litigants endure. Consequently, in accordance with Rule 24, Rules of Appellate Procedure, the Court declines to grant petitioner's application for leave to proceed *in forma pauperis* upon appeal.

IT IS SO ORDERED this 11 day of May, 1971.

WILLIAM C. O'KELLEY
United States District Judge

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1971

No. 71-2270

D. C. Docket No. CA-13995

MRS. BILLIE B. McCLURE,

Plaintiff-Appellant,

versus

THE SALVATION ARMY,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

Before:

WISDOM, COLEMAN and SIMPSON,
Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said

District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

March 17, 1972

Issued as Mandate: May 4, 1972

Order of the United States Court of Appeals Ruling on Petition for Rehearing

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

[CAPTION OMITTED]

(April 26, 1972)

ON PETITION FOR REHEARING

Before:

WISDOM, COLEMAN and SIMPSON,
Circuit Judges.

PER CURIAM: It is ORDERED that the parties bear their own costs in this Court and in the district court.